

COPY

April 27, 2004

Sullivan Township, Moultrie County, Illinois
Petitioner,

Vs.

Union Pacific Railroad Company and the State of Illinois, Illinois
Department of Transportation,
Respondents.

T03-0048

Petition for an Order of the Illinois Commerce Commission
authorizing permanent closure and removal of the T.R. 104 grade
crossing (DOT # 167270M) and authorizing the signalization and
improvement of the T.R. 117A grade crossing (DOT # 167269T)
located in Sullivan Township, Moultrie County, Illinois on the
trackage of Union Pacific Railway Company, together with
construction of a connecting road, and allocating a portion of the
cost to the Grade Crossing Protection Fund.

STAFF BRIEF ON EXCEPTIONS TO ORDER ON REHEARING

Now comes Staff of the Rail Safety Section of the Illinois Commerce Commission, one of the Respondents herein, by and through its representative to the case, and pursuant to 83 Illinois Administrative Code, Chapter I, Section 200.830, hereby submits a Brief on Exceptions to the Administrative Law Judge's Proposed Order, offering the following Exceptions. Staff acknowledges that this Brief is being filed post deadline. Staff wishes that it be allowed to submit this Brief because staff was out of the office with an illness and was hospitalized for several days.

Staff did recommend that the cost for the connecting road be divided 50% to the Grade Crossing Protection Fund administered by the Commission and 50% the Union Pacific Railroad Company. Staff testified that he was told that prior to the hearing, the cost division for the case will be, among other things, 50%-50% as stated above. However, there was a misunderstanding between staff and his superiors over derivation of the cost division for the connecting road. Staff misunderstood that a 50-50 cost division between the Grade Crossing Protection Fund and railroads for the construction of connecting roads would be staff's position in all projects. Staff intends to consider the 50-50 cost division as an option in cases where closure of a public grade crossing equipped with automatic warning devices is being reviewed, since elimination of future maintenance costs would benefit the railroad. For projects that include the closure of public grade crossings equipped only with passive warning signs, staff normally bases its cost division recommendation on the amount the Grade Crossing Protection Fund would pay to install automatic warning devices at a crossing if were to remain open. In most cases, the Grade Crossing Protection Fund contribution is sufficient to cover the entire cost of constructing a connecting road. However, that should not be construed to

DOCKETED
APR 27 2004

mean staff's position in the past has been to recommend the Grade Crossing Protection Fund pay 100% of the cost of connecting roads. In this case, the cost of constructing a connecting road far exceeds the Grade Crossing Protection Fund contribution. Staff estimates the Grade Crossing Protection Fund portion of the cost to install automatic flashing light signals and gates at the TR 104 crossing, added to the amount staff estimates the railroad will save on the future maintenance of the warning devices and crossing surface, including the cost of a new crossing surface installation if needed, is equal to approximately 50% of the cost to construct the proposed connecting roadway.

I believe the Administrative Law Judge negates most of the UP's arguments when he states in the Proposed Order on Rehearing:

"The UP, through previous Commission Orders, attempts to establish that the Commission, in most prior cases involving the construction of a connecting road, paid all the cost for a connecting road therefore establishing a precedence. However, the Commission is free to make decisions without regard to prior Commission Orders.

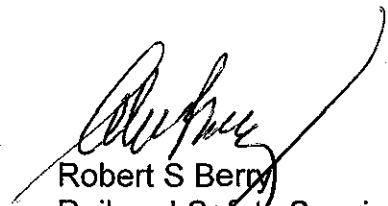
"The concept of public regulation includes of necessity the philosophy that the commission shall have power to deal freely with each situation as it comes before it, regardless of how it may have dealt with a similar or even the same situation in a previous proceeding. What ever may be the moral obligation of the commission to adhere to the purpose and spirit of its own previous orders, it cannot be said that it is under a legal duty to do so." Mississippi River Fuel Corp. v. Illinois Commerce Commission, 116 N.E. 2d 394 p. 396

The UP's closing argument centered on two points; (1) that Staff should have given longer notice to the parties of its inability to pay 100% of the cost of the connecting road and (2) the benefit to the UP for the closure of the TR 104 crossing is far less than the \$213,120 allocated to the UP for 50% the cost of the connecting road. The UP believes that the benefit goes mainly to the road agency and the vehicular traffic traveling to Lake Shelbyville. In rebuttal, the UP received a copy of the Commission's FY 2004-2008 Crossing Safety Improvement Program that had this project listed as a FY 2003 project with the Fund, among other funding in the project, allocating \$250,000 toward the cost of the connecting road. During prior hearings on similar cases, the UP was made aware of the financial condition of the Fund and that parties were being required to pay higher percentages for improvements than they had in the past. The UP should have surmised that there was the possibility of it paying a larger portion of the cost of the improvements(s). As to the benefit to the railroad for the closure of the TR 104 crossing, it is true that most of the vehicular traffic are recreational vehicles going to the lake or commercial vehicles to Agri-Fab, but the priority here is that vehicular traffic no longer has to cross the UP track at any point to get to the recreational facilities as before. Additionally, the railroad will not have the maintenance cost with the closure of the TR 104 crossing. And such cost would increase dramatically if the TR 104 crossing were left open and signalized. Also, with the closure of the TR 104 crossing, the UP will no longer have financial liability at the crossing in case of a vehicle/train collision."

In summary, staff remains of the opinion that the UP should pay the amounts as set forth in the Proposed Order on Rehearing for the three line items of the warning

device installation, crossing surface installation, and participation in the cost for the connecting road.

Very truly yours,



Robert S. Berry
Railroad Safety Specialist

cc:

Mr. Victor A. Modeer
Director of Highways-IDOT
ATTN: JEFF HARPRING, ROOM 205
2300 South Dirksen Parkway
Springfield, IL 62764

Mr. Dave McKernan
Union Pacific Railroad Company
210 N. 13th St., Room 1612
St. Louis, MO 63103-2388

Mr. Mack Shumate, Jr.
Union Pacific Railroad Company
101 N. Wacker Dr., Ste. 1920
Chicago, IL 60606

CT Corporation System
Union Pacific Railroad Company
208 S. LaSalle Street
Chicago, IL 60604

Elmo Weaver
Sullivan Township Hwy Comr.
RR3, Box 109
Sullivan, IL 61951

Floyd E. Denton
Sullivan Township, Supervisor
1023 S. Main Street
Sullivan, IL 61951

Gary W. Bruce
Sullivan Township, Clerk
802 Sunset Drive
Sullivan, IL 61951

Mr. Dean W. Jackson
Attorney, Union Pacific
938 S. Fourth Street
Springfield, IL 62703